No. 56996-5-II

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**COURT OF APPEALS, DIVISION II**
**OF THE STATE OF WASHINGTON**

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TERRY COUSINS, as personal representative of the ESTATE OF RENEE FIELD, deceased,

Appellant,

v.

STATE OF WASHINGTON and DEPARTMENT OF CORRECTIONS,

Appellee.

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# APPELLANT'S REPLY BRIEF

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This Court's holding in *Dotson v. Pierce County*, 13 Wn. App. 2d 455, 464 P.3d 563 (2020) must be overturned. Whether that is done here, or through review by the Supreme Court of Washington, the judicially created rule that the statute of limitations is triggered by a "closing letter" rather than the "last production of records" completely ignores the plain language of the statute and incentivizes agencies to silently withhold record for a year past the "closing letter" then produce more records without consequence. This is not just a "policy argument." It is a basic rule of statutory construction that a Court's first step is to read the language of the statute.

The Dotson rule is having serious consequences for Washington citizens. Most recently, this Court followed the Dotson rule to dismiss a requestors case in *Earl v. City of Tacoma*, No. 56160-3II, 2022 WL 269522, (July 2, 2022) (unpublished disposition). In that case, the City had closed Earl's request for police records. Two years later, it defended civil claims using documents responsive to Earl's public records request that it had never produced. Earl had no way of knowing that the records even existed, and took the City's statement that there were no more responsive records at face value. So, she sued for silent withholding of the records. This Court dismissed her case using the Dotson rule, holding that the limitations period started to run at the time of closure, rather than the time of production or discovery of documents two years later.

Either through application of the statutory language or through the discovery rule, agencies should not be permitted to issue a "closing letter," then withhold records (whether intentionally or negligently), without facing consequences. And it should not be up to a requestor to prove "bad

faith" under an equitable tolling analysis just to overcome an errant or false "closing letter." Rather, whether records were withheld in bad faith or through recklessness or negligence should be part of the penalty analysis. Where an agency truly makes a mistake and fails to produce records after a search, courts have broad discretion to award small or even zero penalties. Where bad faith is involved, courts can punish an agency by going to the top of the $0-$100 range.

One thing is clear: the Dotson rule is hurting requestors, failing to hold agencies accountable, and undermining the broad public policy of government transparency intended by the Legislature.

## A. DOTSON'S RELIANCE ON A "CLOSING LETTER" IGNORES THE PLAIN LANGUAGE OF THE STATUTE

As correctly stated by the Department, "horizontal stare decisis" does not apply between or among the divisions of the Court of Appeals as binding precedent. Opp. Br. at 24, citing *In re Arnold*, 190 Wn.2d 136, 154, 310 P.3d 1133 (2018). The *Dotson* decision is contrary to the plain language of the Public Records Act, and this Court should abrogate it now.

This case involves straightforward rules of statutory construction.

> Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 19, 978 P.2d 481 (1999). **Our starting point must always be "the statute's plain language and ordinary meaning."** *Id.* When the plain language is unambiguous--that is, when the statutory language admits of only one meaning--the legislative intent is apparent, and we will not construe the statute otherwise. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Just as **we "cannot add words or clauses** to an unambiguous statute when the legislature has chosen not to include that language," *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003), **we may not delete language** from an unambiguous statute: "'Statutes must be

> interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996)).

*State v. J.P.*, 149 Wash. 2d 444, 450, 69 P.3d 318, 320 (2003) (emphasis added).

Here, the statute of limitations in the Public Records Act could not be more clear. RCW 42.56.550(6) states:

> Actions under this section must be filed within one year of the agency's claim of exemption **or the last production of a record** on a partial or installment basis.

RCW 42.56.550(6). Nowhere in the statute or in any interpreting regulations does the term "closing letter" appear. The courts cannot add that language to the statute, nor can they delete the words "last production of a record."

Neither the *Dotson* court nor the Department of Corrections in this case wrestle with this inconvenient fact. Instead, the Department simply argues that *Dotson* was correctly decided because it provides "clarity." Opp. Br. at 31.

*Dotson* is likewise inconsistent with the Supreme Court's holding in *Belenski v. Jefferson County*, which held that the statute of limitations begins to run at the agency's "final, definitive response." 186 Wn.2d 452, 461, 378 P.3d 176 (2016). When an agency produces documents after a "closing letter," that closing letter is no longer "final" or "definitive."

### B. IF A "CLOSING LETTER" HAS LEGAL MEANING, SO MUST A "REOPENING" OF A REQUEST

But this case is possible to resolve by distinguishing *Dotson*. If the courts recognize a "closing letter" as the definitive trigger for the statute of limitations regardless of a subsequent production of records, the courts

should also recognize that a Department's decision to formally "reopen" the request must restart the clock. The Department calls this interpretation "unpersuasive and overly formalistic," and ironically argues that there "is no language in the statutory text to support this novel theory." Resp. Br. at 22-23.

That is exactly Plaintiff's point. The statutory text *does not support* the holding in *Dotson* that gave so much weight to something called a "closing letter." However, if a formal "closing letter" triggers the limitations period, it is only logical that when an agency "reopens" the request, it is no longer "closed" and the clock restarts. At a minimum, this interpretation would support the textual language that would allow the limitations clock to run from the "last production of a record." RCW 42.56.550(6).

To be clear, Plaintiff submits that the far better read of this statute is to give no dispositive weight to either a "closing letter" or a "reopening" since neither term appears in the statutory text or interpretive regulations. This is especially true because agencies will simply produce more records without "reopening" in order to fit within *Dotson*. But if *Dotson* is to stand, the court should at least recognize an agency's decision to "reopen" a request as an undoing of the original "closing letter."

The Department misleadingly tries to argue that this was not a "reopening" because it "did not tell Cousins" it was doing so. Resp. Br. at 23. But the Department produced documents under the same PRA tracking number, CP 535-36, eventually providing an additional 10 installments, and the records specialist testified this was a "reopening" not

a new request. CP 576 lns. 9-15. There really is no other way to interpret what happened here.

The Department's next argument is a straw person; the Department incorrectly states that Cousins has argued that *Dotson* should be distinguished because of the number of records produced after closure in the present case was more than in *Dotson*. Resp. Br. at 20. That is not Plaintiff's argument and never has been. The magnitude of the failure of production in this case goes to penalties, not to whether *Dotson* should govern this case.

The Department next mischaracterizes Ms. Cousins' argument regarding the Department's stated reason for closing her request by stating that Cousins' "brief cites no part of the record to support that" that the Department closed the request for "non-payment," suggesting that there is none. Resp. Br. at 21. That statement is false, as is the implication. Ms. Cousins set forth in her opening brief how she had received notice that her request was closed for failure to pay, citing the Department's own internal notes, CP 590 ("no pymt rec. FILE CLOSED), the email the Department wrote, CP 502 ("the Public Records Unit has not received payment for Installment 7"); and another email confirming that failure to pay was the reason for closing the request, CP 528 ("Your request was closed due to our office not receiving payment for the records we offered to you on October 31, 2018.") Opening Br. at 7, 10. At deposition, records personnel acknowledged that subsequent payment would then reopen the request. Opening Br. at 18-19, citing CP 559 at lns 7-21.

If the Department wants the overly formalistic and statutorily unsupported "closing letter" to start the clock, it is only fair that a "reopening" should have the opposite and reciprocal effect.

### C. *HOBBS* IS NOT APPLICABLE HERE, SINCE PLAINTIFF'S CASE IS BASED ON UNREASONABLE DELAY RESULTING IN DENIAL OF ACCESS TO RECORDS

This case involves a government agency that took nearly five years to produce records about an inmate who died it its custody. Even at the time of the initial "closure letter" in January 2019, the Department had been producing records little by little for two and a half years.

The Department now argues that if Plaintiff prevails in her argument that it "reopened" the request in 2020, then her claim is not ripe and should be dismissed under *Hobbs v. State*, 183 Wn. App. 925, 936, 335 P.3d 1044 (2014).1 *Hobbs* held that "before a requester initiates a PRA lawsuit against an agency, there must be some agency action, or inaction, indicating that the agency will not be providing responsive records." *Id.*

The plain language of the statute shows that a requestor may seek judicial review where an agency does not produce records "within a reasonable amount of time." Specifically, RCW 42.56.550(4) provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not to exceed one hundred dollars

1 Ms. Cousins suggests that if the Court reverses on the *Dotson* issue, the best course of action would be remand for argument and findings on the *Hobbs* issue, including consideration of the recent *Cantu* case discussed here, which was not available to the trial court at the time of its decision. This is particularly true because the *Cantu* case sets forth new standards for when delay becomes denial. The parties should be afforded the opportunity to develop arguments under this standard in front of the trial court.

> for each day that he or she was denied the right to inspect or copy said public record.

Strict adherence to the *Hobbs* ripeness doctrine would allow agencies to avoid producing records *and* liability by perpetually estimating that more time is needed to produce records, making superfluous .550(4)'s remedy for unreasonable delay in production of records.

This conundrum was recently addressed by Division III in *Cantu v. Yakima School District No. 7*, No. 37996-5-III, 2022 Wash. App. LEXIS 1600 * | 2022 WL 3037178, ___ Wn. App. ___, ___ P.3d ___ (August 2, 2022) (published opinion). In many ways, the facts of *Cantu* mirror the present case. Like here, the plaintiff in that case repeatedly communicated with the agency in an attempt to find out where her requested records were. *Id.* at *33-34. Periods of time would go by with little to no communication from the agency. *Id.* at *33-34. Finally, 172 days after submitting her request, Ms. Cantu sued, claiming that here records request had been effectively denied. *Id.* at *34.

Division III held that "an agency's inaction, or lack of diligence in providing a prompt response to a records request can ripen into constructive denial for purposes of fees, costs, and penalties under the PRA." *Id.* *35. It also held that "whether a constructive denial has occurred is based on an objective standard from the requesters' perspective and will depend on the circumstances of each case." *Id.* *35.

Here, from Ms. Cousins' perspective, she believed her request was still open after her communications with the Department in both January 2019 and October 2019. That is because she persisted in telling the agency that there were still records that were outstanding, eventually leading to agency silence for long periods of time. *See* Opening Br. at 8-11, CP 105,

115, 116, 517, 524-31, 537-38, 572, 574-575, 579. She persisted until finally the department reopened the request. CP 535-36, 578. When the agency began producing documents again, and over the next 6 months, the vast majority of the records were duplicates of records that had been produced before. Feeling she was just being given the runaround, Ms. Cousins brought suit on January 12, 2021. Finally, on June 23, 2021 and August 18, 2021, the Department produced records it had never before produced. CP 106. Thus, as noted in *Cantu*, the "suit was reasonably necessary to obtain the records requested and caused the release of the records." *Id. at *39* (quoting *Violante v. King County Fire Dist. No. 20*, 114 Wn. App. 565, 567, 59 P.3d 109 (2002)). After years of persistence, and after filing a lawsuit, Ms. Cousins finally obtained hundreds of pages she sought 5 years before.

**D. THE DISCOVERY RULE SHOULD APPLY**

As set forth in her opening brief, Ms. Cousins urges this Court to apply the "discovery rule" in cases involving late-disclosed records, not the doctrine of equitable tolling. The Department suggests that this issue was not preserved, but concedes that Plaintiff argued that the discovery rule is a more appropriate doctrine than equitable tolling in her briefing. Plaintiff also argued that "*Dotson* was wrongly decided" on page 11 of her response to summary judgment filed on October 8, 2021. In any event, because the trial court was bound to follow *Dotson*, no argument could be made suggesting that the trial court should adopt the discovery rule. The argument is appropriately made here, or in the event *Dotson* is followed, the Supreme Court.

The Department also argues that the discovery rule does not apply to the facts of this case. In the trial court, Ms. Cousins and the superior court judge were required to apply the doctrine of equitable tolling, which under *Belenski* looks at the diligence of the requestor and a showing of bad faith by the producing agency. It is Ms. Cousins' position that application of equitable tolling is itself in error because that standard is insufficient to address violations of the Public Records Act. Once an agency has failed to produce a record, a violation of the Act has occurred. The only remaining question is the degree to which a court should award statutory penalties. In order to do that, a court looks at a multi-factored test, one of which includes evidence of bad faith or malfeasance on the part of the agency. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 467-68, 229 P.3d 735 (2010). (describing the fifth factor as: "[N]egligent, reckless, wanton, bad faith, or intentional noncompliance with the PRA by the agency."). This shows that bad faith is part of the penalty analysis.

The discovery rule works well in most cases, and in particular such cases as the present one, *Dotson*, and *Earl*. That is because in most cases, a requestor has no way of discovering whether records have been silently withheld and whether there is evidence of bad faith other than by filing a lawsuit and conducting expensive discovery. In all three of these cases, documents were later produced that the requestors didn't even know had been withheld. Under equitable tolling, a department could withhold records silently, and so long as it doesn't create a written record that it did so in bad faith, it can use the statute of limitations to defend against years-long silent withholding without penalty.

Under the discovery rule, however, the standard is simply whether a withholding was later discovered of which the requestor did not know and, through reasonable diligence, would not have known. Once that occurs, there is an actionable violation, and the requestor can decide to sue, keeping in mind that penalties will not generally be awarded in cases of true negligent withholding after a diligent search and production process.

"The decision to extend the discovery rule to a cause of action is essentially a matter of judicial policy." *Denny's Restaurants, Inc. v. Sec. Union Title Ins. Co.*, 71 Wn.App. 194, 216, 859 P.2d 619, 631 (1993) (citing *Gazija v. Nicholas Jerns Co.*, 86 Wn.2d 215, 221, 543 P.2d 338, 342 (1975)). Ms. Cousins urges this Court to extend the discovery rule here, promoting government transparency and accountability.

This document contains 2826 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 24th day of August, 2022.

Respectfully submitted,

_____s/_*Joe Shaeffer*___ _
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## DECLARATION OF SERVICE

I hereby declare that on August 24, 2022, I electronically filed the foregoing *Appellant's Reply Brief* with the Court of Appeals Division II of the State of Washington, and arranged for service of a copy of the same on the parties to this action as follows:

| | |
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| Attorneys for Respondent: | ☒ Via WA State Courts' Portal<br>☐ Via Facsimile |
| Robert W Ferguson<br>Attorney General | ☐ Via First Class Mail<br>☐ Via Email<br>☐ Via Messenger |
| Timothy J. Feulner<br>WSBA #45396<br>Assistant Attorney General<br>Corrections Division<br>OID #91025<br>P.O. Box 40116<br>Olympia, WA 98504<br>(360) 586-1445 | ☐ Via Overnight Delivery |

DATED this 24th day of August, 2022, at Seattle, Washington.

*s/ Lucas Wildner*

Lucas Wildner, Legal Assistant

## MACDONALD HOAGUE & BAYLESS

## August 24, 2022 - 2:14 PM

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